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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RAFIK Y. KAMELL,

Plaintiff and Appellant,

v.

DAVID REID,

Defendant and Respondent.

G046015

(Super. Ct. No. 30-2009-00300140)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

Rafik Y. Kamell, in pro. per., for Plaintiff and Appellant.

La Follette, Johnson, De Haas, Fesler & Ames, and Michael D. Reid for Defendant and Respondent.

Rafik Y. Kamell appeals from a judgment in favor of David Reid after Reid's demurrer to the third amended complaint was sustained without leave to amend. The gist of the action is that Kamell, an attorney, gave Reid, a physician and allegedly successful stock investor, access to his online trading account to direct Kamell's investments. Kamell believed Reid would achieve a 50 to 60 percent annual rate of return for him, while at the same time investing prudently and safely so as to protect Kamell from any losses. Needless to say, that did not occur, and Kamell sued Reid for fraud, negligence, breach of fiduciary duty, breach of contract, and violation of state and federal laws requiring registration of securities brokers. When Kamell's third attempt at amending his complaint to state viable causes of action failed, the action was dismissed. Because Kamell has utterly failed to carry his appellate burden to demonstrate the trial court erred, we affirm the judgment.

#### FACTS AND PROCEDURE<sup>1</sup>

Kamell's original complaint alleged two causes of action titled investment advisor's security fraud and breach of fiduciary duty. His first amended complaint alleged six causes of action: (1) investment advisor's security fraud; (2) breach of contract; (3) breach of fiduciary duty; (4) negligence; (5) violation of Corporations Code section 25000 et seq.; and (6) violation of "Federal Rule 10b-5."<sup>2</sup> Reid's demurrer to the amended complaint, which is not in the record on appeal, was sustained with leave to amend.

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<sup>1</sup> Kamell elected to proceed by way of an appellant's appendix (Cal. Rules of Court, rule 8.124). This court has twice ordered Kamell to correct defects in the appellant's appendix. We specifically directed him the contents must be arranged chronologically and pages must be consecutively numbered. (Cal. Rules of Court, rule 8.144(a)(1)(C) & (D).) Although the final version we received from Kamell did include page numbers, it continues to be presented in a backwards fashion (i.e., reverse chronological order).

<sup>2</sup> Presumably a reference to 17 Code of Federal Regulations, part 240.10b-5.

Kamell's second amended complaint filed November 9, 2010, essentially alleged the same six causes of action: (1) fraud; (2) breach of contract; (3) breach of fiduciary duty; (4) negligence; (5) violation of Corporations Code section 25000 et seq.; and (6) violation of "Federal Rule 10b-5." Reid's demurrer to the second amended complaint, which is not in the record on appeal, was sustained with leave to amend as to the first four causes of action (i.e., fraud, breach of contract, breach of fiduciary duty, and negligence) and without leave to amend as to the other two.

Kamell's third amended complaint (the TAC) filed March 4, 2011, is the operative complaint. In his fraud cause of action, Kamell alleged that in late November 2005 a friend introduced him to Reid, a well-respected physician and businessman. Reid represented himself to also be "an expert investor" and "a fully qualified and experienced investment advisor and financial planner." Reid represented he was knowledgeable about "purchasing and selling securities for profit," would make appropriate but prudent investments for Kamell within Kamell's "risk tolerance, needs and investment objectives," and he regularly obtained annual returns of 50 to 60 percent for himself "and for other clients and would do the same for Kamell using his experience, expertise and computerized investment software." Kamell and Reid entered into an agreement whereby Reid would serve as Kamell's investment advisor and prudently invest Kamell's funds. Kamell entered into the agreement with Reid based on Reid's representations about his investment acumen, which Reid knew to be false. Kamell opened investment accounts with OptionsXpress, an online stock brokerage service, and in the early part of 2006 transferred a total of \$79,133.68 into the accounts, authorizing Reid to make trades for Kamell with these accounts. Kamell alleged that over "the next [few] years," Reid exceeded his authority by making "high risk and imprudent investments" without Kamell's knowledge or consent, causing losses to Kamell's OptionsXpress accounts.

Kamell's breach of contract cause of action incorporated his prior allegations and added that he and Reid had entered into an oral contract on December 1,

2005. Reid was to serve as Kamell's "investment and financial advisor, planner and broker," and was to "appropriately manage and suitably invest" Kamell's accounts consistent with "Kamell's risk tolerance (low to medium risk), needs (preserve capital) and investment objectives (highest return possible for risk and capital retention) . . . ." Reid was "to receive a commission on the profits he generated for Kamell."<sup>3</sup> Kamell alleged Reid breached the contract by "investing Kamell's funds in unsuitable, high risk and imprudent investments" causing damage to Kamell.

The TAC's breach of fiduciary duty cause of action incorporated all prior allegations, and added Reid was Kamell's fiduciary because he was Kamell's investment advisor and had access to Kamell's investment accounts and authority to invest Kamell's money. "Kamell reposed trust and confidence in [Reid]" and Reid breached his fiduciary duties to Kamell by investing Kamell's funds in unsuitable investments, failing to fully disclose the high risk nature of the investments he was making for Kamell, and failing to disclose the status of the investments and that they were losing money.

Kamell's negligence cause of action incorporated all his prior allegations and additionally alleged Reid had undertaken to be Kamell's "investment and financial advisor, planner and broker." Reid was supposed to "appropriately manage and suitably and prudently invest [Kamell's] funds pursuant to [his] risk tolerance, needs and investment objectives . . . ." Reid "deliberately, with oppression and malice, and fraudulently breached his duty of care" by investing in unsuitable investments, failing to fully disclose the high risk nature of the investments he was making, and failing to disclose the status of the investments and that they were losing money.

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<sup>3</sup> In sustaining the demurrer to the TAC without leave to amend, the trial court specifically disregarded this allegation not only because it was "too vague" but also because Kamell could offer no explanation as to why "this critical allegation regarding consideration was missing from" his three prior pleadings.

The TAC's fifth cause of action for violation of the Corporations Code alleged Reid did not have the license required to act as a securities broker-agent. It alleged Reid had held himself out as a broker-agent and engaged in acts of purchasing and selling securities with and on behalf of Kamell. The transactions resulted in "loss of capital and negative net returns" damaging Kamell.

The trial court sustained Reid's demurrer to the TAC without leave to amend. Judgment was entered in Reid's favor, and Kamell appealed.

### DISCUSSION

Kamell contends the trial court erred by sustaining Reid's demurrer to the TAC. We conclude he has failed to demonstrate error and affirm the judgment.

We review an order sustaining a demurrer by exercising our independent judgment to determine whether a cause of action has been stated under any legal theory. (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 788.) We must accept as true properly pleaded allegations of fact but not contentions, deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "The burden is on [appellant] to demonstrate the manner in which the complaint might be amended, and the appellate court must affirm the judgment if it is correct on any theory. [Citations.]" (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459-460.)

The appellate rules are clear: Even when we employ a de novo review, "it is limited to issues which have been adequately raised and supported in [appellant's opening] brief. [Citations.]" (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6; see *McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1016, fn. 4 ["We deem these claims abandoned for lack of argument that the trial court erred in dismissing them"].) "It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and ""all intendments and presumptions are indulged in favor of its correctness."" [Citation.]' [Citation.] An appellant must provide an

argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. ‘Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.’ [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]” (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. omitted.) To consider arguments not adequately raised in the opening brief would require this court to act as appellants’ counsel on appeal. This is not our role.

Kamell’s opening brief is woefully inadequate to demonstrate error. His statement of facts consists of two sentences—he makes no effort to summarize the allegations of his pleadings. His analysis is comprised of a recitation of general principles of law governing review of orders sustaining demurrers without leave to amend, after which he lists the titles of his five causes of action (fraud, breach of contract, breach of fiduciary duty, negligence, and “[v]iolations of Corporations Code”), followed by the statement he “stated [them] with sufficiency, he could also have stated a cause of action for promissory estoppel had he been allowed to proceed.” Kamell makes absolutely no attempt to set forth the elements of any of his causes of action, explain how the allegations of his TAC sufficed, or explain how he could amend his complaint to state any of those causes of action. Kamell’s brief does contain a separate section with the heading “[Kamell] properly stated a private cause of action pursuant to Corporations Code section [25501.5] and Code of Civil Procedure section 1029.8” (italics omitted), but again he offers no explanation as to what those code sections provide him in the way of a cause of action, no analysis of his pleading’s allegations and how they sufficed, nor any explanation as to how he could amend his complaint to state any of the causes of action. Accordingly, Kamell’s arguments are waived and the judgment is affirmed. (*Lewis v.*

*County of Sacramento* (2001) 93 Cal.App.4th 107, 116 [appellant's responsibility to affirmatively demonstrate error].)

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.